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In The
Supreme Court of the United States

TONY HAYS and CHARLES C. THOMPSON, II,
Petitioners/Appellants

And

WORLDNETDAILY.COM and REBECCA HAGELIN,
Petitioners/Appellees

v.

CLARK JONES,
Respondent/Appellee

Reply Brief to Respondent's Brief in Opposition

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION
With Appendix

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On June 25, 2007, Respondent, Clark Jones (hereinafter "**Respondent/Plaintiff**"), in response to the petition for writ of certiorari filed by petitioners (hereinafter "**Petition**"), Tony Hays, Charles C. Thompson II, WorldNetDaily.com and Rebecca Hagelin (hereinafter "**Petitioners/Defendants**") filed what is titled "Respondent's Brief in Opposition" (hereinafter "**Response**"). Pursuant to ***Rules Of The Supreme Court Of The United States***, Rule 15.5, Petitioners/Defendants reply to the Response as follows.

Reply One: §1257 Finality

Respondent/Plaintiff asserts that this Court is required to deny the Petition because this Court lack subject matter jurisdiction for the lack of finality pursuant to Title 28, ***United States Code*** §1257.

The argument concerning jurisdiction for lack of finality is premised on a foundation that is inconsistent with the state of the record and is unsupportable in light of controlling precedent from this Court.

A statement of the controlling law appears in ***Kansas v. Marsh, II***, ___ U.S.___, 126 S.Ct.2516, 165 L.Ed.2d 429 (2006) where this Court stated as follows at 2525-2521:

> Title 28 U.S.C. §1257 authorizes this Court to review, by writ of certiorari .. . The court has determined that the foregoing authorization permits review of the highest court of a State, even though the state-court proceedings are

> not yet complete, 'where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case.' *Cox Broadcasting* [*Corp. v. Cohn*, 420 U.S. 469], *supra* at 481,...[1975].

Another statement of the prevailing rule concerning the finality prerequisite to this Court's subject matter jurisdiction appears in ***Nike Inc v. Kasky***, 559 U.S. 654, 658 (2003).

In ***Nike***, this Court cited ***Radio Station WOW Inc. v. Johnson***, 326 U.S. 120, 124 (1945) as authoritative.

The state of the record in the instant case could not more tightly fit what this Court describes by the above case authority.

Respondent/Plaintiff labors to convince this Court that the Petition is presented to this Court by an unauthorized interlocutory appeal.

This is opposite from the position taken by Respondent/Plaintiff in the trial court and the court of appeals and is incorrect, irrespective of the position taken by Respondent/Petitioner.

In the trial court, Respondent/Plaintiff filed the motion that produced the order that produced the appeals, which are the subject of the Petition. Respondent/Petitioner's

motion invoked the Tennessee Shield Law codified in ***Tennessee Code Annotated*** §24-1-208.

The defense against the motion revolved around §24-1-208 and the requirements of the United States Constitution (Pet., App. N, S, T).

The trial court entered its April 8, 2004 order (Pet., App. Q), granting the relief sought by Respondent/Plaintiff, by reference to §24-1-208.

On June 21, 2004, the trial court entered what is titled "Consent Order On Stay Of Proceedings" (**Appendix A hereto**), to which counsel for Respondent/Plaintiff signified consent, by which Respondent/Plaintiff explicitly acknowledged that the appeal by Petitioners/Defendants was an appeal authorized by §24-1-208 and, because of this, the agreed stay is mandated by §24-1-208.

The court of appeals below received and docketed the appeal in the instant case as an appeal pursuant to ***Tennessee Rules of Appellate Procedure***, Rule 3, an appeal as a matter of right, i.e., for appellate purposes, the order in question is final.

The subject order of the court of appeals (Pet. App. H) is seven paragraphs. Five of the seven reference §24-1-208. The subject appeal as of right has never been about anything other than §24-1-208 and the First Amendment implications of it and/or its application in this case.

The court of appeals decided that, since §24-1-208 explicitly prohibits Petitioners/Defendants from asserting any a privilege to withhold disclosure, in the context of a

defamation case, Petitioners/Defendants had no right to rely on §24-1-208 to resist an order of the trial court requiring disclosure; *a fortiori*, §24-1-208 did not provide Petitioners/Defendants right to appeal, according to the provisions of §24-1-208(c); on this circular reasoning, the court of appeals dismissed the appeal. This is classic bootstrapping.

Respondent/Plaintiff capitalizes on and reasons from this circular reasoning and tries to apply it in hindsight. The faulty logic produces a faulty conclusion, i.e., since the court of appeals decided the newsgatherers are prohibited by §24-1-208 from asserting a claim of privilege of nondisclosure, there was no right to be denied Petitioners/Defendants under §24-1-208, the newsgatherer Petitioners/Defendants had no rights which, if denied, could be appealed under §24-1-208.

The whole question presented for review by this Court is whether the ruling of the court of appeals is erroneous.

The construction the court of appeals gave §24-1-208 makes the order of the trial court from which the appeal is taken no less an order explicitly entered under and based on §24-1-208 and makes the decision of the court of appeals no less a decision, in a Rule 3 appeal, governed by §24-1-208(c).

In the trial court, in the court of appeals, in the Tennessee supreme court, and, now, in this Court, Petitioners/Defendants have consistently asserted by motion, responses and briefing that §24-1-208 provided a

shield protecting the freelance newsgatherers from having to disclose confidential sources. Petitioners/Defendants, from the beginning, have claimed that §24-1-208 is a codification of what the United States Constitution provides, even without §24-1-208.

While the court of appeals did not address the claims of Petitioners/Defendants concerning the United States Constitution, the court of appeals construed §24-1-208 as explicitly requiring from the Petitioners/Defendants who are newsgatherers (i.e., Hays and Thompson) that which Petitioners/Defendants have claimed from the beginning that the United States Constitution prohibits any court from requiring.

While the claim of Petitioners/Defendants did not commence as a challenge to the constitutionality of §24-1-208, as the issue developed before the court of appeals, the constitutionality of §24-1-208 was drawn in question; therefore, Tennessee's Attorney General made appearance.

The ruling of the court of appeals construed §24-1-208 in such a way as to crystallize and make paramount the claims concerning either the constitutionality or the unconstitutional application of §24-1-208.

The Response attempts to convert what has been an appeal relative to the constitutional right of freelance newsgatherers to withhold disclosure of confidential sources in civil defamation cases into a discovery dispute.

Never, throughout the disputation on the issue at hand, has the dispute been litigated as a discovery dispute.

However, if it had been disputed from the inception as a discovery dispute, the same claim of constitutional rights is before this Court.

Indeed, §24-1-208 is predicated on what, in practical effect, is a special circumstance discovery procedure, i.e., the terms of §24-1-208 prohibit a court from ordering disclosure, under specified circumstances, and, if disclosure is ordered, the newsgatherer is given opportunity to challenge the order to disclose by a Rule 3 appeal as of right and stays all further trial court proceedings until the appeal has run its full course.

In some cases, disclosure orders use civil contempt powers to incarcerate the newsgatherer, subject to the newsgatherer or obeying the order and disclosing the confidential source. The trial court's order does not use the civil contempt power to incarcerate; rather, the court has ordered disclosure subject to a different kind of penalty, i.e., disclose or sacrifice truth as a defense. This difference is quantitative and not qualitative. This appeal is about what is qualitative.

If disclosure is ordered, under threat of sanction by court order, whether the order emanates from a discovery dispute or §24-1-208 is form over substance. The substance focuses on whether the United States Constitution permits a court to punish **(in all cases and without any showing of necessity by the defamation case plaintiff)** a freelance newsgatherer, in the context of a civil defamation case, for exercising what the freelance newsgatherer asserts to be a

right guaranteed by the United States Constitution to withhold disclosure of the confidential source.

The necessary "finality" occurs by virtue of the fact that the courts force the freelance newsgatherer to suffer the sanction which, when suffered, creates an irreparable harm.

Waiting until after either the freelance newsgatherer has endured a lengthy trial, in which the newsgatherer is prohibited from asserting truth as a defense, on the civil defamation claims of Respondent/Petitioner or, to enable himself to assert truth, breach the confidence of the confidential source, as prerequisite to have the constitutional legality of the sanction reviewed by this Court, makes the review a futile attempt to put humpty dumpty back together.

If a newsgatherer breaches the confidence of the confidential source in order to preserve the truth defense, who will be legally obligated to pay damages to the confidential source because of the newsgatherers' breach?

If, because unable to rely on the truth defense, the freelance newsgatherer suffers a verdict in damages in the defamation case, who will be legally responsible for either paying the defamation judgment or, even, paying the cost of the supersedeas bond while the freelance newsgatherer exercises his appellate right?

The State of Tennessee and its judicial officers have immunity that shields both from any liability, even if the freelance newsgatherer is ultimately vindicated. Likewise, Respondent/Plaintiff would have no liability because of the

judicial immunity accorded him from being a party in litigation, presuming his suit was initiated and continued without the malice prerequisite to liability for malicious prosecution.

Thus, unless afforded the review on appeal that §24-1-208 assures newsgatherers, a newsgatherer could win the battle over the newsgatherer's constitutional right not to disclose confidential sources and lose the war because the battle came too late.

Reply Two: First Amendment Effects

As it presently stands, any newsgatherer in the United States who gathers information from a confidential source and publishes or causes that information to be published in such a fashion that it reaches Tennessee and/or affects a person in Tennessee who claims to be defamed by the information, on such person making a claim for defamation, the newsgatherer can be hauled into court in Tennessee and, with **no** other **questions** to be asked (e.g, **need on the part of the plaintiff claiming defamation**), can be forced by court order to disclose the identity of the confidential source.

The sanction imposed by the court below was sacrifice of the truth defense. There is nothing that limits future courts to such a sanction. The court order to disclose could come in the context of an order to compel, in a discovery dispute, and, on non-compliance, the court could enter a default judgment against the newsgatherer or impose a *per diem* economic penalty. Indeed, courts are given wide

discretion in creating sanctions to compel compliance with orders to disclose discoverable information. And, there is nothing to prohibit criminal contempt proceedings against the newsgatherer for failure to comply with a court order.

To say that this chills exercise of First Amendment rights is a understatement. To say that the impact of this chilling effect is nationwide is a mere recognition of reality.

One hundred years ago, this Court succinctly stated as follows in ***Patterson v. Colorado ex. rel. Atty General,*** 205 U.S. 454, 462 (1907):

> The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative. A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint 'freezes' it for the time.

See also, ***Nebraska Press Ass'n v. Stuart,*** 427 U.S. 539, 559 (1976).

Another poignant statement by this Court appears as follows in ***New York Times v. United States,*** 403 U.S. 713, 714 (1971):

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions, and to do so on pain of libel judgments virtually unlimited in amount, leads to ... self-censorship ... . [A]llowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.

Statutes creating conclusive presumptions that preclude the ascertainment of truth are unconstitutional. ***United States v. Wells***, 283 U.S. 102, 116-17; ***Heiner v. Donnan***, 285 U.S. 312, 328 (1932). The sanction imposed by the trial court below and affirmed by the court of appeals, in essence, denies Petitioners/Defendants opportunity to claim that what was reported was true, even though it emanated from a confidential source. This is the creation of a conclusive presumption that is an impediment on ascertainment of the truth.

IN THE CIRCUIT COURT OF HARDIN COUNTY
TENNESSEE

CLARK JONES

v.

TONY HAYS, ET AL.

No. 3414

CONSENT ORDER ON STAY OF PROCEEDINGS

It appearing to the Court that the Defendants, Tony Hays and Charles C. Thompson, II, have filed a Notice of Appeal to The Court of Appeals at Jackson from the Order entered April 8, 2005 regarding sources of information procured for publication or broadcast, and that the Parties hereby acknowledge that under T.C.A. 24-1-208 (B) the proceedings and trial in this action are stayed.

IT IS THEREFORE ORDERE BY CONSENT:

That the proceedings and trial of this action are hereby stayed pursuant to T.C.A. 24-1-208 (B).

/s/ Charles O. McPherson
Special Circuit Court Judge

Date: 6-21-04

Approved and Agreed for Entry:

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